F. M. S.

[ORIGINAL CIVIL JURISDICTION]

McFALL, J.

September 19, 1933.

KHOO EE LIANG (EXECUTOR OF KHOO CHEW PAN DECEASED) .. Plaintiff

vs.

HENRY WAUGH & CO., LTD. .. Defendant

[SELANGOR CIVIL SUIT No. 204 of 1933]

Probate and Administration Enactment 1920, Section 11—Power of surviving executor to maintain suit—Land Code 1926, Section 119—Implied liability of lessee for rates and taxes—Limitation Enactment—Lessor's right to recover from lessee founded on breach of contract in writing.

A single surviving executor is empowered by Section 11 of the Probate and Administration Enactment 1920 to maintain a suit on behalf of the Estate, without being obliged to join the personal representatives of the deceased executors under Section 45 of the Contract Enactment. In the absence of any agreement to the contrary all rates and taxes payable in respect of property leased fall upon the lessee. The lessor is entitled to recover from the lessee any sums paid by the former for rates and taxes.

Under the Limitation Enactment a suit by the lessor for the recovery of such rates and taxes is founded upon a breach of contract in writing and is covered by Article 95 of the Second Schedule to the Enactment.

P. Ford for plaintiff.

E. D. Shearn for defendant.

Cur. Ad. Vult.

MCFALL, J.—Plaintiff Khoo Ee Liang as executor of Khoo Chew Pan deceased sued Henry Waugh & Co., Ltd., defendant for $3,118.78 being the total amount of rates and taxes for the period 1st October 1928 to 1st October 1933, paid by the plaintiff on the premises No. 7, Old Market Square, Kuala Lumpur, interest at the rate of 8% from judgment to realisation and costs of suit.

Plaintiff admitted that the burden of proof that he had paid the sum claimed to the Sanitary Board was on him. Thereupon defendant admitted that plaintiff had paid the sum. The actual nature of the rates and taxes in question was never divulged to the Court. It was assumed by both sides in argument that they were such rates and taxes as are imposed under section 12 Enactment No. 13/1916 or sections 25 and 26 Enactment No. 26/1929.

Facts were admitted as follows:—

The late Khoo Chew Pan by his will dated 27th April 1918 and first codicil dated 27th September 1920 appointed Khoo Ee Liang and How Kim Leng executors and trustees of his will. These two gentlemen obtained probate of the will and codicil on 9th May 1921.

On 26th September 1928 these two gentlemen as representatives of the deceased leased the land held under Selangor Certificate of Title No. 6073 in the Town of Kuala Lumpur known as No. 7, Old Market Square, Kuala Lumpur to Katz Brothers Ltd., which company about May 1929 changed its name to Henry Waugh & Co., Ltd., "at the yearly rent of $4,800 payable by equal monthly payments in advance on the first day of each month the first of such monthly payments to be made on the 1st day of October 1928 subject to the agreements and powers implied under the Land Code, 1926 and subject to the stipulations modifications terms and conditions hereinafter contained."

The lease was duly presented and registered at the Land Office, Kuala Lumpur.

Since the date of the lease and before this suit was instituted, How Kim Leng the executor and trustee died and his place under the will remains unfilled.

The lessee Company now defendant have occupied and still occupy the premises and, presumably, have paid all the rent due up to date of this suit. It is admitted that the defendant has not paid to the Sanitary Board rates and taxes on the leased property amounting to $3,118.78 for the period 1st October 1928 to 1st October 1933, and that the plaintiff has paid that sum in respect of such rates and taxes: and has demanded from the defendant payment of that sum. Plaintiff alleges that by section 119 of the Land Code, 1926 an implied covenant of the said lease is that the lessee will pay all rates and taxes which may be payable in respect of the property during the continuance of the lease and has now as executor of Khoo Chew Pan deceased brought this suit claiming the sum of $3,118.78 which plaintiff has paid for the defendant.

Mr. Shearn for the defendant contested the claim on three grounds. First ground that the plaintiff as executor of Khoo Chew Pan deceased could not alone maintain this suit, but that he must join the personal representatives of the deceased executor and trustee How Kim Leng: he relied upon sections 155—158 of the Land Code, 1926, and section 45 Contract Enactment.

Mr. Ford for plaintiff referred to section 11 Probate and Administration Enactment and Section 20 of the Trustee Enactment 1932 (section 18 En. 19 '20) and the will of the deceased. The Court thought that the opening words of the lease "We Khoo Ee Liang and How Kim Leng as representatives of Khoo Chew Pan deceased of Kuala Lumpur being registered as proprietors..... do hereby lease" notify clearly that these two gentlemen were executors and trustees of deceased's will or administrators of his estate, and that, on the death of one, the survivor would have, under the Probate and Administration Enactment 1920 passed subsequent to the Contract Enactment of 1899, all the powers of both in respect of the estate, and that the defendant accepted the lease on that basis. The Court

therefore held that the plaintiff could bring and maintain the suit as it stands.

Mr. Shearn's second ground was that in section 119 (a) Land Code, 1926 "payable" should be construed "legally payable by the tenant in respect of the property" and referred to sections 12 and 41 Sanitary Boards Enactment (13/1916), amendment of section 12 by section 3 Enactment 19/1924 section 4 Enactment 20/1925 and to sections 32 and 54 Sanitary Boards Enactment (26/1929) and asked for a strict construction of all sections.

Mr. Ford contended that the Sanitary Boards Enactment only went so far as to show that Sanitary Boards looked primarily to the owners of property for payment of taxes levied, but that that fact had no bearing on a contract between the owner-lessor and the occupier-lessee that the latter should pay the taxes.

At 26th September, 1928 the date of the lease the Land Code, 1926 and the Sanitary Boards Enactment No. 13/1916 as amended by Enactment No. 19/1924 were in force. Sanitary Boards Enactment No. 26/1929 repealed Enactment No. 13/1916 and came into force on 1st February 1930.

Section 119 of the Land Code, 1925 is as follows:—

> "In any memorandum of lease there shall be implied the following agreements by the lessee, that is to say:
>
> (*a*) that he will pay the rent thereby reserved at the times therein mentioned and all rates which may be payable in respect of the property during the continuance of the lease;
>
> (*b*) that he will at all times during the continuance of the lease keep at the termination thereof yield up the leased property in good and tenantable repair, accidents and damage from fire, storm and tempest and reasonable wear and tear excepted."

Section 12 Enactment 13/1916 as amended by section 3 Enactment No. 19/1924 reads as follows:—

> "The Resident of any State, after consultation with the Sanitary Board of any area in such State, may from time to time so often as he thinks necessary impose either separately or as a consolidated rate or rates an annual rate or rates within such area for all or any of the following purposes;
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> (*a*) the general purposes of this Enactment,
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> (*b*) public lighting,
>
> (*c*) the extinction and prevention of fire,
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> and may for this purpose subdivide the Sanitary Board area into two or more parts, and imposes in each separate part such rate as may be considered just and proper.
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> (ii) Such rate or rates shall be assessed upon the annual value of all lands houses and buildings, or upon the improved or unimproved value of all lands, as the case may be, according as the Resident of the State after consultation with the Sanitary Board may determine; provided that such rate or rates, if assessed upon the annual value of lands houses and buildings, shall not exceed in the aggregate in one year fifteen per centum of such annual value.
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> (iii) The rate or rates shall be fixed from time to time by the Resident of the State after consultation with the Sanitary Board and shall be payable by half yearly instalments in advance without demand by the owners of such lands houses and buildings in the months of January and July in each year.
>
> (iv) The terms 'improved value of land' and 'unimproved value of land' shall be deemed to have the meanings assigned to them respectively in 'The Valuation of Land Enactment, 1922.'"

Sections 25—28 of Enactment No. 26 of 1929 are of like import to section 12 just quoted.

Section 41 Enactment No. 13/1916 reads:—

> "If any sum due from the owner of any house or building on account of any rate or fee is paid by the occupier thereof, such occupier may in the absence of any agreement to the contrary with the owner deduct from the next and following payments of his rent the amount which may have been so paid by him."

Sections 32 and 54 Enactment No. 26/1929 read:—

> 32. "The rates referred to in sections 25 and 26 shall endure for any period not exceeding twelve months and shall be payable half yearly in advance by the owners of holdings at the office of the Sanitary Board or other prescribed place or places in the months of January and July, and shall be assessed and levied in manner hereinafter provided."
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> 54. "If the sum due from the owner of any holding on account of any rate or costs is paid by the occupier of such holding such occupier may, in the absence of any agreement to the contrary with the owner, deduct from the next and following payments of his rent the amount which may have been so paid by him."

The rates now in question are assessed upon the annual value of the holding: they become a first charge on the holding. The Sanitary Boards look to the 'owner' as distinct from the 'occupier' of the holding as the party primarily liable to pay the rates imposed in respect of that holding. Section 41 Enactment No. 13/1916 and section 54 Enactment No. 26/1929 are, in the text, preceded and followed by sections relating to procedure on default of payment of rates. They shew clearly that the Sanitary Boards only turn to, and compel, the 'occupier' to pay rates when the 'owner' has defaulted in payment. Where the 'occupier' has been compelled to pay rates on the 'owner's' default then section 41 or 54 operated to enable the 'occupier' to recover the amount from the 'owner'. Section 42 Enactment No. 13/1916 provided that "no rate or fee which has remained due from the owner of any house or building for more than one year shall be recoverable from the occupier thereof not being the owner." This section does not re-appear in Enactment No. 26/1929.

In England "the ordinary rule following that of the Poor Relief Act, 1601, is, that rates and taxes fall upon the tenant in the absence of express agreement" Woodfall: Landlord and Tenant (20th Edition) 672. "When a tenant neglects to pay any rates taxes etc., pursuant to his covenant

or promise on that behalf, the lessor may sue him for the breach of such covenant or promise, or he may maintain ejectment if the lease contains a proviso for re-entry applicable to such covenant or promise, but not otherwise." (ibid 679). There are many cases reported where tenants who have expressly covenanted in their leases to pay "all taxes, rates, duties and assessments whatsoever," and such like covenants, have been held liable to pay to their landlords such rates or charges where the landlords have been called upon to pay to the local authority and have paid. Examples are *Thomson* vs. *Lapworth*, (1868) 37 L. J. C. P. 74; *Hartley* vs. *Hudson*, (1879) 48 L. J. K. B. 751; *Wix* vs. *Rutson*, (1899) L.R. 1 Q.B. 474; *Farlow* vs. *Stevenson*, (1900) L.R. 1 C.D. 128.

In the present case the defendent has accepted a lease which is subject to the agreements and powers implied under the Land Code, 1926. That lease is therefore subject to the implied agreements in section 119 that the lessee will pay the "rent.....and all rates and taxes which may be payable in respect of the property during the continuance of the lease." That lease is equally subject to section 121 Land Code, 1926.

> "There shall also be implied in any memorandum of lease the following agreement by the lessor that is to say:
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> that he will pay all rent which shall become payable to the State during the continuance of the lease in respect of the land contained in the lease, and will keep the lessee indemnified against all claims and demands in respect of such rent or in respect of any charges on such property."

Section 119 places upon the lessee the payment of all rates and taxes which may be payable in respect of the property. Section 121 places certain specific payments on the lessor, but it does not place on the lessor any rate or tax payable in respect of the property. So far as the implied agreement under the Land Code is concerned the lessor is not liable to pay any rate or tax in respect of the property during the continuance of the lease and the lessee is liable. In the absence of any other adequate explanation, and in the light of the construction put on express covenants in England which covenants bore some resemblance to the present implied covenant the words in section 119 must be taken to mean what they say on their face that is that the lessee will pay the ordinary rates and taxes imposed on the leased property, and therefore, in this case, that the defendant will pay the rates and taxes which plaintiff has paid and now claims. The Sanitary Boards Enactment regulates the collecting of a tax, but does not affect legal contracts between parties as to where the burden of that tax will ultimately fall.

By virtue of section 41 and section 54 above referred to it is clear that had defendant paid up all the rates as 'occupier' of the premises No. 7, Old Market Square then the defendant could not have deducted such payments from the next and following payments of his rent as there was present "an agreement to the contrary" implied in the lease by virtue of section 119 of the Land Code, 1926.

By section 70 Contract Enactment "where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation in respect of, or restore the thing so done or delivered."

It was not contended or suggested at the trial that the plaintiff intended to make these large payments amounting to $3,118.78 gratuitously. The rates in question became due from the plaintiff; the law would compel the plaintiff to pay them. Plaintiff did pay and now asks the defendant to pay plaintiff the sums plaintiff has so paid out. The decisions in the cases *Upendra Chandra Mitter* vs. *Tara Prasanna Mukerjee*, (1903) 30 Calcutta 794 and *Rajah of Venkatagiri* vs. *Unduthat Salbarayudu*, (1907) 30 Madras 277 are on facts bearing a close resemblance to the present facts, and shew that defendant must pay.

Mr. Shearn's third contention is that, in any event, no sums paid by plaintiff prior to 31st May 1930, i.e. more than three years before the date of the plaint herein, can be recovered because of article 43 or article 92 Second Schedule to the Limitation Enactment. Mr. Ford replied that article 95 in the Second Schedule applied, and relied upon the recent decision of the Court of Appeal in *Kwong Yik (Selangor) Banking Corporation Ltd.*, vs. *The Malayan Daily Express* (1926) Ltd., 2 Malayan L. J. (August 1933) 198.

The period of limitation will depend upon the exact foundation upon which the plaintiff can place his claim to recover this sum from the defendant. In *Spencer* vs. *Parry* (1835) 4 L.J.K.B. 186 where by the stipulations contained in a lease, the tenant was to pay the land tax, which he left unpaid during his tenancy, and which the succeeding tenant paid, and the landlord repaid him it was held that as the tenant's liability only arose from the special agreement, the landlord could not recover the sums so paid in an action for money paid, but must declare on the special agreement.

Here the plaintiff was primarily liable to pay the rates, and by virtue of the terms of section 119 implied in the written lease he is entitled to recover back the sums so paid. The action is therefore on the lease and not for money paid. Articls 43 in the Second Schedule therefore is not suitable, but article 95 which gives a period of limitation of six years for compensation for the breach of a contract in writing is suitable. That period covers all the transactions under a lease for five years which has not yet expired.

The plaintiff therefore in the opinion of the Court, succeeds in this claim completely.

Judgment for plaintiff for $3,118.78 interest at 8% from date of judgment till realization and costs.

Judgment accordingly.

[APPELLATE CIVIL JURISDICTION]

MUDIE, J.

October 7, 1933.

THE RECEIVER AND MANAGER OF PERAK TIN LIMITED .. .. Defendant (Appellant)

vs.

JOHN CHARLES BAUMANN .. Plaintiff (Respondent)

[PERAK WARDEN'S CIVIL APPEAL No. 34 of 1933]

[APPEAL FROM THE DECISION OF THE WARDEN OF MINES, PERAK]

Cancellation of sublease for breach of condition regarding payment of tribute—Mining Enactment 1911 and Mining Enactment 1928 Section 27(ii)(a)—Discretion of Warden to relieve against forfeiture—Applicability of Equitable principles—Rights of parties to a sublease made prior to passing of Mining Enactment 1928 determined by date of accrual—Lessor's right to cancellation acquired at the date of breach—Interpretation and General Clauses Enactment 1932 Section 15.

In 1924 the Respondents who held certain Mining Lands as sublessees granted a sublease to Perak Tin Limited a Company of which the Appellant was appointed Receiver and Manager in 1931.

Both the sublease granted to the Respondent and the sublease granted by the Respondent to the Appellant contained clauses providing for the payment of tribute at rates varying inversely with the number of labourers employed or the equivalent horse power applied in working the mine, with the usual penalty clause. In each case a further clause provided for cancellation by the Warden or the Court upon proof *inter alia* of failure to pay tribute for a period of one month from the date at which payment became due.

The Company granted a further sublease of the Mining Land in 1930 to Lai Weng Huin.

In November 1932 the latter without the knowledge of the Appellant made a reduction in the horse power applied to the working of the mine by substituting for that month an 120 horse power engine for the 200 horse power engine previously used.

Tribute accordingly became payable by the Appellant at the rate of 8% instead of 6% as before.

On 17th January 1933 again without the knowledge of the Appellants the engine then in use was removed from the mine. Tribute accordingly again became payable at 8% from that date.

On the 15th June 1933 the Respondent learning of the removal of the engine in January wrote to the Appellant drawing attention to the change in circumstances and rate of tribute payable as from 17th January and calling for a sum of $117.40 as being payable for enhanced tribute, and also calling for anything further due by way of tribute.

The Respondent also called for a census of labour and machinery employed on the mine during 1932.

The Appellant on being informed of the removal of the engine in January 1933 forwarded a cheque for $117.40 on 17th June 1933.

On 29th June 1933 the Respondent returned the cheque and announced his intention to take proceedings for cancellation of the sublease, unless the Appellant was willing to surrender it.

On 30th June the Appellant replied refusing to surrender the sublease. He forwarded the census of machinery and labour, which he had by then received from his sublessee, and reported the discovery of the reduction by Lai Weng Huin in the horse power applied in November 1932, and on the next day forwarded a cheque for $30.10 as additional tribute due for the month of November 1932.

The Respondent refused this payment in amends and applied for, and obtained, an order from the Warden of Mines Perak for the cancellation of the sublease granted by him to the Appellant.

The latter appealed against this order.

Held, the rights of the parties in regard to forfeiture for a breach of condition to pay tribute arose when the breach occurred. The law applicable was the law in force when the breach occurred, and accordingly the matter was governed by the Mining Enactment of 1928.

Held further, under this last Enactment the Warden of Mines possesses a judicial discretion in the exercise of which in cases of non-payment of tribute he should be guided by English equitable principles in regard to relief against forfeiture for non-payment of rent.

Held further, even if by reason of the Appellant's breaches the Respondent were found liable for a penalty to his sublessor, there was no evidence to show that he might experience difficulty in recovering any such penalty from the Appellant.

J. M. M. Lewis for the Appellant. Failure to pay tribute at the rate prescribed is admitted, but the Appellant was ignorant of change in methods of working employed by his sublessees and unaware that tribute had become due at an enhanced rate, until he received in June notification to that effect from the Respondent. The Respondent called for the additional tribute from January 17th. For this the Appellant sent a cheque promptly. The Respondent also called upon the Appellant to adjust without delay any further sums should they be due on account of tribute. The Respondent has waived his right to cancellation if any, and affirmed the relationship of landlord and tenant by deliberate election.

Clause providing for cancellation on default continuing for one month is invalid whether the matter falls under the 1911 or the 1923 Mining Enactment.

Period fixed by law is 6 months. No power to cancel was conferred by the 1911 Enactment on the Warden.

Warden acted under Section 97(2) of the Mining Enactment 1928 and possesses a discretion.

Yap Foong v. *Salak South Ltd.*, does not apply, Innes on Registration of Title 145.

In exercising discretion the Warden should have regard to English equitable principles. *Lai Yew Seng* vs. *Wong Chin Gook*, 2 F.M.S. Law Reports 112.